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IN THE

SUPREME COURT

OF THE

United States

October Term, 1953

HARRY EDWARD FLORENTINE,
Petitioner,

vs.

H. R. LANDON, as District Director of Immigration and Naturalization at Los Angeles, California,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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IN THE

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HARRY EDWARD FLORENTINE, *Petitioner,* vs. H. R. LANDON, as District Director of Immigration and Naturalization at Los Angeles, California, *Respondent.*	No. .....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Harry Edward Florentine, respectfully petitions this Honorable Court for a writ of certiorari, directed to the United States Circuit Court of Appeals for the Ninth Circuit, to review the judgment of that Court, dismissing his petition for a writ of habeas corpus, on the grounds that petitioner, a

native-born citizen of the United States, "must first exhaust his administrative remedies in deportation proceedings before the question of citizenship may be raised by habeas corpus" (R. 28), and as grounds petitioner respectfully represents as follows:

OPINION BELOW

The opinion of the court below is contained in the Transcript of Record at pages 28-32.

JURISDICTION

The jurisdiction of this Court is sought to be invoked under Title 28, section 1254, United States Code.

STATUTES INVOLVED

ART. I, Sec. 1, Constitution of the United States:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

ART. I, Sec. IX(2), Constitution of the United States:

> "The privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it."

ART. III, Sec. I, Constitution of the United States:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. . . . "

ART. III, Sec. II, 1, Constitution of the United States:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; . . . "

ART. V, Amendments of the Constitution of the United States:

" . . . nor be deprived of life, liberty, or property, without due process of law; . . . "

ART. XIV, Amendments of the Constitution of the United States:

"1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Title 28, U. S. C. A. 2241:

"The writ of habeas corpus shall not extend to a *prisoner* unless—

(1) He is in *custody* under or by color of the authority of the United States or is committed for trial before some court thereof."

1949 Edition, Code of Federal Regulations, Title 8, Section 150.6:

"Custody of arrested aliens—(a) Released on bond or conditional parole. *An alien* arrested in deportation proceedings may, pending final determination of his deportability and in the discretion of the officer in charge of the office having custody of the alien, be released under bond or on conditional parole, unless specified instructions to the contrary shall have been issued. . . . "

"(d) Conditions of release under bond or on parole. It shall be among the conditions of any bond or terms of parole pursuant to paragraph (a) of this section that the alien be produced, or will produce himself (1) when required to do so for the purpose of defending himself against the charge or charges under which he was taken into custody and any other charges which subsequently may be lodged against him, (2) for deportation if an order of deportation has been made, and (3) such other appropriate conditions *as may be prescribed.*"

"(f)(2) An alien placed under parole supervision pursuant to this paragraph shall be advised that he will be liable to criminal prosecution for a

felony, and may, upon conviction thereof, be fined not more than $1,000 or be imprisoned not more than one year, or both, if he (i) wilfully fails to comply with the requirements of such parole supervision; or (ii) wilfully fails to appear to give information; or (iii) wilfully fails to submit to medical or psychiatric examination if required; or (iv) knowingly gives false information in relation to the requirements of such parole supervision; or (v) knowingly violates any reasonable restriction imposed upon his conduct or activity."

QUESTIONS PRESENTED BY THIS PETITION

1. Is a native-born constitutional citizen of the United States, under deportation proceedings, required to exhaust all administrative process in the Department of Justice, Immigration and Naturalization Service, before he can seek relief through habeas corpus, to determine the question of his United States citizenship?

The question as posed by the prevailing opinion of Justices Denman and Healy, concurred in by separate opinion of Justice Orr, is as follows:

> "The question raised by this appeal is whether one who is claiming to be a United States citizen must first exhaust his administrative remedies in deportation proceedings before the question of citizenship may be raised by habeas corpus." (R. 28 and 31.)

2. Is the restraint upon the liberty of a native-born citizen of the United States by arrest and parole supervision of the Immigration Service subject to judicial inquiry by habeas corpus proceedings?

PLEADINGS

Petitioner Harry Edward Florentine, a native-born citizen of the United States, filed his petition for writ of habeas corpus, alleging in substance the following:

That he, a constitutional citizen of the United States, was born on March 18, 1911, at Los Angeles, California, and at no time since his birth acquired citizenship or nationality of any other country, or became an alien of the United States (R. 3).

He alleged his enlistment and service in the United States Navy and subsequent honorable discharge therefrom (R. 3-4).

He alleged the issuance of the warrant of arrest in deportation proceedings by the respondent Immigration Service, charging that he was an *alien* and had entered the United States on the 15th day of December, 1944, in violation of the Immigration laws, and is subject to be taken into custody and deported on the ground that at the time of such entry he was not in possession of a valid immigration visa (R. 4-5).

He alleged that on March 27, 1951, he was taken into custody by the respondent Immigration Service

and detained and restrained of his liberty, and placed under conditional order of parole, which required him to report to the Parole Officer on the 26th day of each month commencing on the 26th day of April, 1951, and each month thereafter (R. 6). That on June 14, 1951, petitioner was further restrained of his liberty on a further conditional parole order (R. 6). This order of conditional parole permits petitioner to be at large during compliance, with the following conditions:

(1) That the alien shall produce himself when required.

(2) That the alien shall produce himself for deportation.

(3) Shall produce himself for the purpose of furnishing additional information.

(4) That the alien shall notify the officer in charge of any change in residence or employment within 48 hours after change is made.

(5) That the alien shall report in writing on the 26th day of each month to the officer in charge of the Immigration and Naturalization Service at San Diego, California, which report shall contain (a) the name, (b) alien registration number, (c) date, (d) current address, and (e) place of employment.

(6) The order further provided that his failure to comply with the conditions may result in revocation of his parole and detention in custody (R. 12).

The petition further recites that after hearings conducted by the Service the Hearing Officer on the 3rd day of June, 1951 rendered his written decision, in which he determined *that your petitioner was a native-born constitutional citizen of the United States under Article 14, section 1, of the Constitution of the United States; that he had remained out of the United States for the purpose of evading service in the armed forces of the United States; that he was therefore an alien and at the time of his last purported entry on December 15, 1944 was not in possession of a valid immigration visa* (R. 8-9). It further appears from the petition that the Service reopened the proceedings to permit him to apply for suspension of deportation (R. 9).

The petition further alleged that the hearings and determination of his status as an alien by the said Service were in violation of his rights and privileges as a native-born constitutional citizen of the United States and in violation of his constitutional privileges under the fifth and fourteenth amendments of the Constitution of the United States and in excess of the right, authority and jurisdiction of the respondent Immigration Service (R. 9).

The District Court at Los Angeles, California, issued its writ of habeas corpus directed to the District Director of Immigration at Los Angeles.

The respondent, H. R. Landon as District Director of Immigration at Los Angeles by way of answer to

said petition, filed his return "for the purpose of showing cause why the said writ should be discharged and the petition for a writ of habeas corpus denied", and answered substantially as follows:

> "(a) *Admits that petitioner was born on March 18, 1911, at Los Angeles, California, and was a citizen of the United States at his birth;* alleges that petitioner lost his United States citizenship and became an alien of the United States since some time prior to December, 1944, and petitioner has never re-acquired United States citizenship since that date, in any manner . . .
>
> (b) That the petitioner lost his United States citizenship and became an alien by reason of his having expatriated himself under Section 401(j) of the Nationality Act of 1940 as amended . . . (R. 14).

Concerning petitioner's residence in the United States the respondent denied that "petitioner had any lawful residence in the United States at any time after August, 1942 . . . " (R. 15), and alleged that petitioner "was an alien without the documents required of immigrants" at the time of his entry on or about December 15, 1944, at El Paso, Texas. He further alleged that petitioner was "excluded from permanent residence in the United States but paroled into the United States to answer a criminal charge, to-wit: violation of Section 311, Title 50, U. S. Code, for failure to report for induction as aforementioned." The answer further admits the issuance of the warrant of arrest in deportation on March 27, 1951 (R. 15).

Respondent admits that petitioner was taken into custody, but was released from said custody on the same day upon parole, and denies that such parole constituted an unlawful detention or restraint of petitioner's liberty (R. 16). The respondent further admits that a further order of conditional parole was entered on June 14, 1951 in petitioner's deportation proceedings as shown by "Exhibit A" attached to petitioner's petition for a writ of habeas corpus, but denies that such order of conditional parole in any of its provisions has at any time effected an unlawful detention or restraint of petitioner's liberty (R. 16).

The answer further alleged that petitioner (a) *is an alien and is not a citizen of the United States;* (b) *was lawfully taken into custody;* (c) *is subject to deportation proceedings;* (d) *that all administrative proceedings . . . against the petitioner have been fair, impartial and lawful* (R. 16-17).

The District Court "examined the pleadings and received written and oral argument", ordered findings and conclusions, and determined that the restraint upon the petitioner by virtue of the order of conditional parole was not sufficient to invoke the jurisdiction of the Court on habeas corpus to determine petitioner's citizenship, and thereupon discharged the writ (R. 20) and entered judgment accordingly (R. 21-22).

CIRCUIT OPINION

The pertinent language of the Circuit opinion follows:

> "The allegations of the pleadings reveal that Florentine was born on March 18, 1911, in Los Angeles, California. . . . " (R. 29).
>
> "There is no merit to Florentine's claim that the fact that he is claiming United States citizenship gives him a right to institute this habeas corpus proceeding without regard to the status of the administrative proceeding. . . . No special circumstances exist why the orderly way provided by Congress to raise the fundamental question of citizenship through the administrative proceedings should not be pursued. They should be carried through to completion before a habeas corpus proceeding may be instituted. Even where a person claiming citizenship is permitted to bring an action for declaratory relief in order to determine citizenship, the administrative remedies must first be exhausted." (Opinion by Chief Judge Denman, concurred in by Healy, Judge, R. 30-31.)

THE QUESTIONS ARE SUBSTANTIAL

The District Court denied a hearing to petitioner for a determination of his citizenship for the reason that the restraint upon petitioner's liberty was not sufficient to invoke the jurisdiction of the Court on a writ of habeas corpus.

The prevailing opinion of the Circuit determined that petitioner must first exhaust his administrative remedies in deportation proceedings before the question of citizenship may be raised by habeas corpus.

Petitioner, an admitted native constitutional citizen of the United States, claims his rights and privileges as a citizen and national of the United States, has been denied him by the respondent Immigration Service, on the ground that he is an alien and not entitled to any rights and privileges as a citizen of the United States.

Petitioner contends that the acts and conduct of the respondent in attempting to require petitioner to depart or be deported from the United States are in violation of the fifth and fourteenth amendments of the Constitution of the United States and a denial of his rights of constitutional citizenship.

The opinion of the Circuit has now determined that the question of constitutional citizenship can not be raised by habeas corpus until the exhaustion of all administrative remedies and proceedings.

The denial of the right to judicial inquiry of claimed citizenship is in violation of Article I, section 1, of the Constitution of the United States, and Article III, section 2, subdivision 1 of the Constitution, which provide as follows:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." (Art. I, sec. 1.)
>
> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; . . . " (Art. III, sec. 2, 1.)

The direct issue involved is the violation of petitioner's rights and privileges as a native-born constitutional citizen of the United States. Can the Court limit its jurisdiction and choke its authority in habeas corpus proceedings by denying a hearing to a native-born constitutional citizen, who contends that his rights and privileges as a citizen under the Constitution are being invaded by the executive until such executive finally determines the constitutional issue of citizenship?

The Circuit erred in its determination:

(1) That administrative remedies in deportation proceedings must first be exhausted before a claim of citizenship can be raised by habeas corpus.

(2) That the petition for the writ should have been dismissed as premature.

(3) That the claim of United States citizenship does not give petitioner a right to institute habeas corpus proceedings without regard to the status of the administrative proceedings.

(4) That no special circumstances exist why the orderly way provided by Congress to raise the fundamental question of citizenship through the administrative proceedings should not be pursued.

The Circuit evidently failed to recognize that the executive has determined that the petitioner is an alien and had illegally entered the United States, and is subject to deportation. The opinion is predicated upon the pendency of proceedings before the executive, reopened at "Florentine's request to permit him to apply for suspension of deportation." It is not the determination of the suspension of deportation that the petitioner assails, *but the determination of alienage by the executive in violation of his constitutional citizenship which has been carried through to finality. Suspension of deportation is no issue unless predicated upon a prior determination of alienage* (section 155, Title 8, U. S. C. A., as amended by Public Law 863, 80th Congress, July 1, 1948, in effect on the date of the filing of the petition for writ of habeas corpus).

Congress has not provided a way to raise the fundamental question of citizenship through administrative proceedings.

The Circuit opinion is directly contrary to its opinion rendered in the case of *Wong Wing Foo vs. McGrath,* 196 Fed. (2d) 120, wherein the Court held:

> "Nothing in the above text suggests that the 'action . . . for a judgment declaring him to be a national is to succeed some prior administrative proceeding. This section is largely invoked where there has been no administrative proceeding at all. Such is the case where the Department of State refuses to give a passport, *Perkins v. Elg,* 307 U. S. 325, 59 S. Ct. 884, 83 L. Ed. 1320; *Podea v. Acheson,* 2 Cir., 179 F. 2d 306; or where a counsel refuses to register a person as a United States National, *Acheson v. Mariko Kuniyuki,* 9 Cir., 189 F. 2d 741; or refuses to allow a person claiming American citizenship to come to this country, *Acheson v. Yee King Gee,* 9 Cir., 184 F. 2d 382; or where American citizens acting under claimed duress have filed with the Attorney General notices of their renunciation of citizenship and then later seek to have them set aside, *McGrath v. Tadayasu Abo,* 9 Cir., 186 F. 2d 766. In none of the above cited cases is the sec. 903 action a trial *de novo.* There has not been anything tried by the Department of State or of Justice to be tried again on appeal or review.
>
> We do not think the independence of the 903 action is lost in other cases where the denial of the 'right or privilege' is preceded by a hearing at which findings are made and a decision reached. *The right to citizenship is a priceless thing and Congress in enacting sec. 903 in 1940 well could have decided that citizenship shall not be denied*

one possessing it, by an administrative proceeding such as 8 U. S. C. A., sec. 153, first enacted in 1917, in which the right to any counsel is denied and mere hearsay evidence which may be determinative is admissible, Gong You v. Nagle, 9 Cir., 34 F. 2d, 848; Jung Yen Loy v. Cahill, 9 Cir., 81 F. 2d 809, and in which the finding as to citizenship is deemed final, United States v. Ju Toy, 198 U. S. 253, 25 S. Ct. 641, 49 L. Ed. 1040.'" (Emphasis added.)

STATEMENT OF THE CASE

The application for writ of habeas corpus is predicated upon the allegation that "petitioner Florentine, a constitutional citizen of the United States, was born on the 18th day of March, 1911, at Los Angeles, California, and at no time since his birth has he acquired citizenship or nationality of any other country, or become an alien of the United States. Petitioner is presently residing in the United States and within the jurisdiction of the above entitled Court." (R. 3).

It is alleged that on *March 21, 1951,* Landon, District Director of Immigration at Los Angeles, with knowledge of petitioner's birth in the United States, his claim to United States citizenship and nationality, his residence in the United States, and his service in the armed forces, issued his warrant of arrest in deportation, charging petitioner with *being an alien, who entered the United States at El Paso, Texas, on December 15, 1944, on the grounds that at the time of said entry he was an immigrant not in possession of a*

valid immigration visa . . . (R. 4-5). Petitioner alleges the denial of his constitutional rights to American citizenship, his detention and restraint of his liberty by parole. He attacks the jurisdiction of the executive concerning his restraint on the grounds that it is in violation of the fifth and fourteenth amendments of the Constitution of the United States. He alleges that in hearings held before the Immigration Service it was determined by written decision on the 3rd day of June, 1951, that *petitioner was a native born constitutional citizen of the United States under Article XIV, section 1, of the Constitution of the United States;* that he had remained out of the United States for the purpose of evading service in the armed forces of the United States; *that he was, therefore, an alien and at the time of his purported entry on December 15, 1944, was not in possession of a valid immigration visa* (Par. VIII, R. 8).

The return to the writ of habeas corpus by respondent Landon admits that the petitioner was born on March 18, 1911, at Los Angeles, California, and was a constitutional citizen at his birth, but alleges that he lost his United States citizenship and became and has remained an alien to the United States since sometime prior to December, 1944, and has never reacquired United States citizenship since that date (R. 14).

The pleadings are without dispute that petitioner was a native born constitutional citizen of the United States. *The pleadings conclusively establish petitioner's citizenship by birth in the United States.*

The Circuit has determined that petioner has no right to a judicial determination of his constitutional citizenship unless and until there has been a prior final administrative determination of such citizenship.

Petitioner alleged in his petition that on June 3, 1951, there was a determination by the respondent Service that he "was an alien and at the time of his last purported entry on December 15, 1944, was not in possession of a valid immigration visa (R. 8-9). The answer of the respondent alleges that petitioner lost his United States citizenship and became an alien sometime prior to December, 1944, *and admitted that the Service had determined that petitioner was an alien on June 3, 1951* (see admission in answer, Par. VIII, R. 17).

Paragraph VIII (R. 17) of the answer of the respondent admits all the allegations of Paragraph VIII of the petition, viz: the determination by the hearing officer that petitioner was an alien.

The proceedings were ordered reopened solely for the purpose of "permitting him to apply for discretionary relief of suspension of his deportation" (Par. IX, R. 17).

It is the determination by the Service of petitioner's alienage that he seeks to attack by these proceedings—not the pendency of any proceedings for suspension of deportation, as *suspension is only applicable to aliens who have been ordered deported or are under deportation proceedings.* Alienage and citizen-

ship are the only issues involved in these proceedings. *The determination of his alienage in 1951 by the Service has long since become final.*

Suspension of deportation is only applicable to aliens (See Public Law 863, 80th Congress, Ch. 783, 2d Session, "To amend Sub-section (c) of Sec. 19, Immigration Act of 1917, as amended, and for Other Purposes"):

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (c) of section 19 of the Immigration Act of February 15, 1917, as amended (54 Stat. 671; 56 Stat. 1044; U. S. C. 155(c), is further amended to read as follows:
>
> 'In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart from the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization, or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deport-

able alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act . . . Approved July 1, 1948."

The answer of the respondent Landon further alleges that petitioner lost his United States citizenship and became an alien by reason of his having expatriated himself under section 401(j) of the Nationality Act of 1940, as amended (8 U. S. C. A. 801(j), 50 Stat. 746), in that petitioner, after receiving from the lawfully constituted Selective Service authorities an order for his induction into the armed forces of the United States on September 9, 1942, departed from the jurisdiction of the United States in August of 1942 and remained outside the United States until on or about December 15, 1944 . . . (Par. I, R. 14).

THE CIRCUIT OPINION APPLIED AN ERRONEOUS THEORY OF LAW AND FAILED TO CONSIDER THE CONSTITUTIONAL CLAIM TO AND RIGHT OF CITIZENSHIP.

The prevailing opinion of the Circuit, in denying the petition for the writ of habeas corpus on the ground that it was premature, cites the following authorities:

United States v. Sing Tuck, 194 U. S. 161;
U. S. ex rel Russo v. Thompson, 188 Fed. 2d 244;
U. S. ex rel Zdunci v. Uhl, 144 F. 2d 287;
McGrath v. Kristensen, 340 U. S. 162.

The concurring opinion on this point cites *U. S. ex rel Bradley v. Watkins,* 163 Fed. 2d 328.

None of the cases cited is authority for the proposition which they propound.

In the *Sing Tuck* decision, the writ was filed on behalf of the petitioner and 38 others who were "seeking admission into the United States. On examination by an inspector, five gave their names, stated they were born in the United States . . . and answered no further questions. The rest gave their names and then stood mute, not even alleging citizenship. The inspector decided against their right *to enter* the country, and informed them of their right to appeal to the Secretary of Commerce and Labor. No appeal was taken and while they were detained at a properly des-

ignated detention house for return to China, a petition was filed . . . alleging that they all were citizens of the United States." The Court determined:

> "Whatever may be the ultimate rights of a person seeking to enter the country, and alleging that he is a citizen, it is within the power of Congress to provide, at least for a preliminary investigation by an inspector, and for a detention of the person until he has established his citizenship in some reasonable way. . . . Now, when these Chinese, having that opportunity, saw fit to refuse it, we think an additional reason was given for not allowing a habeas corpus at that stage. The detention during the time necessary for investigation was not unlawful, even if all these parties were citizens of the United States, and were not attempting to upset the inspection machinery by a transparent device. . . ."

The breadth of the opinion may be summarized in the following language of the court:

> ". . . upon the question of citizenship, we agree . . . that a petition for habeas corpus ought not to be entertained unless the court is satisfied that the petitioner can make out at least a prima facie case. A mere allegation of citizenship is not enough. . . . ."

The instant proceedings against Florentine were not exclusion. His birth and residence in the United States are admitted. The *Sing Tuck* decision is not

applicable. *Zdunci v. Uhl, Russo v. Thompson,* and *Bradley v. Watkins* are not applicable, as all of the petitioners were admitted aliens.

In *Zdunci v. Uhl,* an admitted alien, no warrant of deportation had been issued. He being held as an enemy alien, the court determined that he had no right to prevent hearings before the Service by means of a writ of habeas corpus, and the writ was properly dismissed as premature.

In *United States ex rel Bradley v. Watkins,* an admitted native born citizen of Norway and an alien of the United States, challenged his detention by the Immigration Service on the grounds that he was illegally held as an alien enemy, on the theory that an alien forcibly "seized on foreign soil by armed forces of the United States Navy, brought as a prisoner to our shores, turned over to the immigration authorities as being an 'applicant for admission to the United States,' held in custody by them for nearly six years, and then deported to the country of his nativity by virtue of the exclusion order, savors of those very ideologies against which our nation has just fought the greatest war of history. The relator is entitled to be released from custody although he has no right to enter the United States."

United States ex rel Russo v. Thompson, supra, is an application by an admitted alien who contended by the allegations of his petition "that the Federal House of Detention is an unlawful place to hold him . . ." The Court determined:

". . . The writ was obviously premature so far as it sought a definite release of the relator from custody, because the final decision to exclude him had not yet been made."

These cases are far cries from the Florentine petition. With due respect to the Circuit, these cases as authority for the Florentine decision have no application.

The *McGrath v. Kristensen* case, *supra,* determined by this Court, is a petition by an admitted alien seeking through declaratory judgment a determination of his eligibility for naturalization in the United States. The prevailing opinion of the Circuit in the instant matter cites *McGrath v. Kristensen* for the proposition that "where a person claiming citizenship is permitted to bring an action for declaratory relief in order to determine citizenship, the administrative remedies must first be exhausted."

Kristensen made no claim of citizenship. Against attempts to deport him he applied for suspension of deportation under section 19(c) of the Immigration Act of 1917, which allows such suspension except as to aliens not eligible for citizenship. Relief was refused by the Attorney General on the sole grounds of his ineligibility for naturalization. He sought a declaratory judgment that he was so eligible. This Court determined that as an alien "he was not residing" in the United States within the meaning of the Selective Service and Training Act and that his application for

relief from service did not bar his eligibility for naturalization.

THE DENIAL BY THE CIRCUIT OF THE RIGHT TO A JUDICIAL DETERMINATION OF PETITIONER'S SUBSTANTIAL CLAIM OF CITIZENSHIP IS A DENIAL OF DUE PROCESS OF LAW.

The right of citizenship is guaranteed by the Constitution of the United States. (Fourteenth Amendment).

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; . . ." (Article III, sec. 2, (1), Constitution of the United States.)

The claim of citizenship in the instant matter is founded upon petitioner's birth in the United States. It is admitted and without dispute. Petitioner's residence in the United States since his last entry on or about December 15, 1944, at El Paso, Texas, is without dispute and admitted in the answer (R. 14-15).

Florentine was not at the border seeking admission into the United States.

The instant proceedings were initiated by the Service to deport an admitted native born constitutional citizen of the United States on the grounds that at the

time of his entry "on or about December 15, 1944 he was an alien and not in possession of a valid immigration visa" (Par. IV, R. 15). On the 3rd day of June, 1951, the Service determined that petitioner was a native born constitutional citizen of the United States; that he had remained out of the United States for the purpose of evading service in the armed forces of the United States, and that he therefore was an alien and at the time of his last purported entry on December 15, 1944, was not in possession of a valid immigration visa (Par. VIII, R. 8).

The denial by the Circuit of the right to a judicial determination after a finding by the Service of petitioner's alienage was a denial of due process of law and the denial of his right of citizenship and for a judicial determination thereof under Article III, sec. 2 (1) of the Constitution of the United States.

It is basic that citizenship in the United States and all of its consequent privileges and immunities flowing from such citizenship are the most prized, important and valuable possessions guaranteed by our Constitution. It is difficult to imagine that a determination of such privilege of citizenship is to be left to an executive officer without regard to the remedy or relief in the judicial department of our Government.

As stated in *United States v. Wong Kim Ark*, 169 U. S. 649, 675, 42 L. Ed. 900:

> "In the forefront, both of the 14th Amendment of the Constitution, and of the civil rights act of

1866, the fundamental principle of citizenship by birth within the dominion was reaffirmed in the most explicit and comprehensive terms.

The civil rights act, passed at the first session of the Thirty-ninth Congress, began by enacting that 'all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States, and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every state and territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. Act of April 9, 1866 (14 Stat. at L. 27, chap. 31, sec. 1)."

The very same Congress, evidently believing it unwise and perhaps unsafe, to leave so important a declaration of rights to depend upon an ordinary act of legislation, which might be repealed by any subsequent Congress, framed the 14th Amendment of the Constitution of the United States and shortly there-

after, on June 16, 1866, by join resolution, proposed it to the legislators of the several states, and on July 28, 1868, the Secretary of State issued a proclamation showing it to have been ratified by the Legislature of the requisite number of states. 14 Stat. at L. 358; 15 Stat. at L. 708.

It therefore appears that the civil rights act, with all its detailed rights, privileges and immunities, was then embodied in the 14th Amendment of the Constitution.

This amendment is declaratory in form, and enabling and extending in effect. Its main purpose doubtless was, as has often been recognized by this Court, to establish the citizenship of free negroes which had been denied in the opinion delivered by Chief Justice Taney in *Dred Scott v. Sandford* (1857), 60 U. S., 19 How. 393.

Article III of the Constitution created the Supreme Court of the United States and such inferior courts as the Congress may from time to time ordain and establish.

The power, authority and jurisdiction of the courts are expressly granted, created and provided, though not necessarily limited, to those matters involving the Constitution, the laws of the United States, and treaties made. With the exception of the Supreme Court, the formation of the inferior courts was left to Congress,

but the original power and jurisdiction of the courts at their creation was guaranteed by and provided for in the Constitution. Congress cannot, therefore, limit the power and authority of the courts contrary to the Constitution.

In the instant proceedings, there is an issue directly involving the petitioner's claim of citizenship.

The District Court, in denying the petition for a judicial determination of petitioner's citizenship, is in effect limiting the court's jurisdiction in violation of the Constitution, for *the petitioner claims his rights as a citizen of the United States directly under the Constitution.*

Petitioner's contention that his right of citizenship under the 14th Amendment is being denied and infringed by an executive officer brings in issue a direct issue involving the Constitution.

IT WAS ERROR PREJUDICIAL TO PETITIONER TO SUMMARILY DISMISS THE PROCEEDINGS AFTER FILING OF THE ANSWER AND ISSUE JOINED, WITHOUT A JUDICIAL DETERMINATION OF SUCH ISSUE NO MATTER BY WHAT NAME OR TITLE THE PROCEEDINGS WERE CALLED OR LABELED.

Petitioner's claim of citizenship by virtue of the Constitution is in effect a denial of an essential jurisdictional fact, which entitled him to a judicial determination of the claim of citizenship, and the jurisdiction of the Department of Immigration may be tested in the courts by means of habeas corpus whenever there has been any restraint of a ctizen's liberty in deportation proceedings.

The case of *Ng Fung Ho v. White,* 259 U. S. 276, 42 S. Ct. 492, 66 L. ed. 938, is directly in point:

> "Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact. The situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military law denies that he is in the military service. It is well settled that in such a case a writ of habeas corpus will issue to determine the status. *Ex parte Reed,* 100 U. S. 13, 25 L. ed. 538; *Re Grimley,* 137 U. S. 147, 34 L. ed. 636, 11 Sup. Ct. Rep. 54; *Re Morrissey,* 137 U. S. 157, 34 L. ed. 644, 11 Sup. Ct. Rep. 57; *Johnson v. Sayre,* 158

U. S. 109, 39 L. ed. 914, 15 Sup. Ct. Rep. 773. Compare *Ex parte Crow Dog* (*Ex parte Kang Gi Shun-Ca*), 109 U. S. 556, 27 L. ed. 1030, 3 Sup. Ct. Rep. 396. If the jurisdiction of the Department of Labor may not be tested in the courts by means of the writ of habeas corpus when the prisoner claims citizenship and makes a showing that his claim is not frivolous, then, obviously, deportation of a resident may follow upon a purely executive order, whatever his race or place of birth. For where there is jurisdiction, a finding of fact by the executive department is conclusive (*United States v. Ju Toy*, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644); and courts have no power to interfere unless there was either denial of a fair hearing (*Chin Yow v. United States*, 208 U. S. 8, 52 L. ed. 369, 28 Sup. Ct. Rep. 201), or the finding was not supported by evidence (*American School v. McAnnulty*, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33), or there was an application of an erroneous rule of law (*Gegiow v. Uhl*, 239 U. S. 3, 60 L. ed. 114, 36 Sup. Ct. Rep. 2). To deport one who so claims to be a citizen obviously deprives him of liberty, as was pointed out in *Chin Yow v. United States*, 208 U. S. 8, 13, 52 L. ed. 369, 370, 28 Sup. Ct. Rep. 201. It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the 5th Amendment affords protection in its guaranty of due process of law. The difference in security of judicial over administrative action has been adverted to by this court. Compare *United States v. Woo Jan*, 245 U. S. 552, 556,

62 L. ed. 466, 467, 38 Sup. Ct. Rep. 207; *White v. Chin Fong,* 253 U. S. 90, 93, 64 L. ed. 797, 798, 40 Sup. Ct. Rep. 449."

In *Chin Hoy v. United States,* 239 Fed. 750, the Court said:

"On the 29th of May, 1922, the Supreme Court held in the case of *Ng Fung Ho v. White,* 259 U. S. 276, 42 S. Ct. 492, 66 L. ed. 938, that jurisdiction in the executive department exists only if the person arrested is an alien, that the claim of citizenship is a denial of an essential jurisdictional fact, and that in such case a writ of habeas corpus will issue to determine his status. . . . and for that reason the Fifth Amendment to the Constitution does not afford them protection in its guaranty of due process of law, nevertheless, the Supreme Court in the case first above cited, held that when a prisoner 'claims citizenship' and makes a showing that his claim is not frivolous, the jurisdiction of the Department of Labor may be tested in the Courts. Nor do we think that the requirement for a judicial hearing is satisfied, where the Judge on habeas corpus hearing searches the record of the deportation proceedings and forms therefrom his own conclusions that the claim of citizenship is untrue. Such department proceedings are not judicial and a *quasi* appellate review by a Court does not make them so. Applying this latest decision of the Supreme Court in *Ng Fung Ho v. White, supra,* to the facts of this case it follows that the judgment of the District Court must be reversed and remanded for trial in that Court

of the question of citizenship, for further proceedings in conformity with this opinion."

The matter of *Kessler v. Strecker,* 307 U. S. 22, 59 S. Ct. 694, 83 L. ed. 1082, 1090, on habeas corpus is enlightening on the point advanced to this Court, namely, that where a person asserts his United States citizenship in hearings before the Department of Immigration and supports his claim by substantial evidence, he is entitled to a trial of his claim of citizenship in the United States District Court. The Supreme Court made the following observation:

> "Only in the event an alleged alien asserts his United States citizenship in the hearing before the Department, and supports his claim by substantial evidence, is he entitled to a trial *de novo* of that issue in the District Court. The status of the relator must be judicially determined, because jurisdiction in the executive to order deportation only exists if the person arrested is an alien; and no statutory proceeding is provided in which he can raise the question whether the executive action is in excess of the jurisdiction conferred upon the Secretary."

In a recent opinion the 9th Circuit in *Carmichael v. Delaney,* 170 Fed. (2d) 239, 243-245, the Court, *through Justice Healy,* determined:

> "The question, as we conceive it, is whether a resident of the United States who is denied entry by executive order is entitled as of right, on habeas corpus proceedings, to a judicial trial of his claim

to be a citizen. So far as our search of the precedents has gone the question appears to be one of first impression. The authorities supply no direct answer to it."

. . .

"*Our belief that residence, not the mere form of the proceeding, was regarded as the controlling factor has further support in an observation of Justice Brandeis in his concurring opinion in St. Joseph Stock Yards Co. v. United States,* 298 U. S. 38, 77, 56 S. Ct. 720, 737, 80 L. ed,. 1033. He remarked that 'A citizen who claims that his liberty is being infringed is entitled, upon habeas corpus, to the opportunity of a judicial determination of the facts. And, so highly is this liberty prized, that the opportunity must be accorded to any resident of the United States who claims to be a citizen. Compare *Ng Fung Ho. v. White,* 259 U. S. 276, 282-285, 42 S. Ct. 492, 66 L. ed. 938, with *United States v. Ju Toy,* 198 U. S. 253, 25 S. Ct. 644, 49 L. ed. 1040, and *Tang Tun v. Edsell,* 223 U. S. 673, 675, 32 S. Ct. 359, 56 L. ed. 606.'

"Throughout history banishment or exile has been looked upon as a penalty little less dreadful than death. To one in appellee's situation exclusion is in substance and practical effect the equivalent of banishment. It involves the same severance from home and existing ties that the individual suffers who is expelled from the country in a proceeding to deport. *There is no difference in their loss of freedom of movement or in the nature of the hardships they are called upon to undergo.* The sole distinction resides in the mere matter of nomenclature. The distinction, we think, is of no

moment insofar as concerns the Constitutional guaranty of due process of law.

"We conclude that the trial court was right in granting appellee a judicial trial of his claim. Its findings that he is a native-born citizen of the United States has impressive support in the evidence and can not be said to be clearly erroneous. Affirmed." (Emphasis added.)

The *Ng Fung Ho v. White* decision, supra, is authority for appellant's position that

"Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact.

. . .

"To deport one who so claims to be a citizen obviously *deprives him of liberty,* as was pointed out in *Chin Low v. United States,* 208 U. S. 13, 52 L. ed. 369, 370." (p. 284)

The suggestion of prematurity is erroneous and without substantial merit. This argument was recently answered by the Circuit in the matter of *Wong Wing Foo v. McGrath,* 196 Fed. (2d) 120, wherein the appellee, born in China in 1928, claimed to be the son of an American citizen, arrived in San Francisco on November 28, 1948, and upon presenting a passport from the American Consul General at Hong Kong was denied the right of entry on the ground that he was not the son of an American citizen. He then initiated proceedings under the then effective provisions

of Section 903 of Title 8, U. S. C. A. After reviewing the provisions of Section 903, the Court made the following pertinent observation:

> "Nothing in the above text suggests that the 'action . . . for a judgment declaring him to be a national' is to succeed some prior administrative proceeding. This section is largely invoked where there has been no administrative proceeding at all. Such is the case where the Department of State refuses to give a passport, *Perkins v. Ely,* 307 U. S. 325, 59 S. Ct. 884, 83 L. ed. 1320; *Podea v. Acheson,* 2 Cir., 179 F. 2d 306; or where a counsel refuses to register a person as a United States National, *Acheson v. Mariko Kuniyuki,* 9 Cir., 189 F. 2d 741; or refuses to allow a person claiming American citizenship to come to this country, *Acheson v. Yee King Gee,* 9 Cir., 184 F. 2d 382; or where American citizens acting under claimed duress have filed with Attorney General notices of their renunciation of citizenship and then later seek to have them set aside, *McGrath v. Tadayasu Abo,* 9 Cir., 186 F. 2d 766. In none of the above cited cases is the sec. 903 action a trial *de novo.* There has not been anything tried by the Department of State or of Justice to be tried again on appeal or review.
>
> We do not think the independence of the 903 action is lost in other cases where the denial of the 'right or privilege' is preceded by a hearing at which findings are made and a decision reached. The right to citizenship is a priceless thing and Congress in enacting sec. 903 in 1940 well could have decided that citizenship shall not be denied

one possessing it, by an administrative proceeding such as 8 U. S. C. A. sec. 153, first enacted in 1917, in which the right to any counsel is denied and mere hearsay evidence which may be determinative is admissible, *Gong You v. Nagle,* 9 Cir., 34 F. 2d, 848; *Jung Yen Loy v. Cahill,* 9 Cir., 81 F. 2d 809, and in which the finding as to citizenship is deemed final, *United States v. JuToy,* 198 U. S. 253, 25 S. Ct. 644, 49 L. Ed. 1040."

Petitioner Florentine was not obliged to press through and exhaust all administrative avenues of relief through administration processes before presenting his petition for a judicial determination of his citizenship.

The Matter of Gonzalez v. Williams, 192 U. S. 1, 24 S. Ct. 177, 48 L. Ed. 317, was the case of a Porto Rican who was detained at the port of New York by the Commissioner of Immigration in 1902 as an alien immigrant in order that she might be returned to Porto Rico if it appeared thta she was likely to be a public charge. It was held that since she was not an alien immigrant within the meaning of the immigration laws after Spain had ceded Porto Rico to the United States, the commissioner had no power to detain or deport her and she could obtain release on habeas corpus notwithstanding that no appeal had been taken from the administrative ruling.

The foregoing case is cited in the Matter of *United States ex rel Bradley v. Watkins,* 163 Fed. 2d 328, wherein the relator by writ of habeas corpus challenged

the legality of his detention by Immigration officials. His petition alleged that he was illegally held as an alien enemy under an interment order issued by the Attorney General of the United States, but the respondent's return to the writ asserted that he was detained pursuant to an exclusion order. At his hearing Bradley testified in his own behalf and the respondent put in evidence a transcript of the proceedings before the board of special inquiry. The district judge found as a fact that the relator did not come to the United States voluntarily but concluded that this was immaterial, that the board of special inquiry had jurisdiction to inquire into the case and its order of exclusion was lawful, and *that the relator had failed to exhaust his administrative remedy by an appeal from the board's decision.* The petition for writ of habeas corpus was dismissed. The Second Circuit, however, determined as follows:

> "The first question for consideration is whether the appellant is barred from obtaining a writ of habeas corpus because he failed to take an administrative appeal from the order of exclusion. *If he was an alien to whom the immigration laws were inapplicable, he was not obliged to resort to an appeal to the Attorney General.*"

In *United States ex rel Chu Leung v. Shaughnessy,* 176 Fed. 2d 249, the Second Circuit determined:

> ". . . The Ninth Circuit has recently held that 'residence' is determinative of the claimant's right

to a court trial, and ruled that a resident of the United States who is excluded at the border is entitled to a judicial trial of his claim to be a citizen. *Carmichael v. Delaney,* 9 Cir., 170 F. 2d 239; *Lee Fong Fook v. Wixon,* 9 Cir., 170 F. 2d 245.

The considered opinion of this Court in the *Mederios* case in 1948 (*Mederios v. Watkins,* 166 F. 2d 897, 2d Cir.) refused to make such an exception on the grounds of residence. We adhere to that full and recent expression and we do so without sharing the reluctance expressed by Judge Kaufman."

There is a direct conflict, therefore, between the Second and Ninth Circuits on the right to a judicial determination of citizenship in exclusion proceedings.

The Ninth Circuit in *Espino v. Wixon,* 136 Fed. 2d 96, determined:

"That a judicial trial of the issue of citizenship is necessary seems clear from the facts and the authorities. The act of deportation of a person from this country is authorized and enforced through an executive proceeding. Appellant, like the applicants for a writ of habeas corpus in the case of *Ng Fung Ho v. White,* 259 U. S. 276, 282, 42 S. Ct. 492, 494, 66 L. Ed. 938, did not merely assert his citizenship of the United States and was not in the position of a person stopped at the border when seeking to enter this country. He was already in the United States and had resided therein for years, and he supported his claim to

citizenship 'by evidence sufficient, if believed, to entitle him to a finding of citizenship.' In the cited case the following question is posed: 'Does the claim of citizenship by a resident, so supported both before the immigration officer and upon petition for a writ of habeas corpus, entitle him to a judicial trial of this claim'?

. . . . . .

The Commissioner contends through the district attorney that a review of the proceedings will show that petitioner's claim to United States citizenship is not based upon substantial evidence and cites *Bilokumsky v. Tod,* 263 U. S. 149, 153, 44 S. Ct. 53, 68 L. Ed. 221, and *Kessler v. Strecker,* 307 U. S. 22, 34, 35, 59, S. Ct. 694, 83 L. Ed. 1082, as supporting his position. We do not agree, and we see nothing in the cited cases to support such view.

"In our opinion, the petitioner's claim of United States citizenship, together with his testimony upon that issue before the Immigration authorities requires a judicial hearing. The order of the District Court is reversed, and the cause is remanded with directions to proceed in conformity with this opinion.

Reversed and remanded."

THE OPINION OF THE CIRCUIT IS CONTRARY TO PERKINS v. ELG, 307 U. S. 325, 83 L. Ed. 1320, OCTOBER TERM 1938.

Miss Elg was born in Brooklyn, N. Y., on October 2, 1907. Her mother took her to Sweden in 1911, where she remained until 1929. She was granted an American passport by the American Consul in Sweden and returned to the United States after reaching her majority. In 1935 Miss Elg was notified by the Department of Labor "that she was an alien illegally in the United States and was threatened with deportation. Proceedings to effect her deportation have been postponed from time to time. In July, 1936, she applied for an American passport but it was refused by the Secretary of State upon the sole ground that he was without authority to issue it because she was not a citizen of the United States."

It nowhere appears from the decision that there was a determination of citizenship by the Immigration Department in deportation proceedings. Miss Elg was not in custody.*

In the instant matter petitioner Florentine's status as a citizen of the United States had on June 3, 1951, been ruled adversely to him by the administrative decision of the Immigration Service and he was determined to be an alien of the United States. Administratively, Florentine's position is stronger and more fortified on the adjudication of alienage by the Service than Miss Elg in *Perkins v. Elg, supra.* Yet the Circuit determined that Florentine must further exhaust his administrative remedies.

The 9th Circuit opinion is directly contrary to the decision of this Court in *Perkins v. Elg, supra.* Miss Elg was not directed to exhaust her administrative remedies if any existed. The mere dispute concerning her constitutional claim of citizenship between the Department of Labor and herself was sufficient basis for the court's jurisdiction. Yet the Circuit in the instant matter after an adjudication by the Immigration Service of alienage of petitioner Florentine directs him to further pursue his remedies before the administrative body.

She brought a declaratory judgment action under the terms of the Declaratory Judgment Act, 28 U. S. C. A. 2201, against the Secretary of Labor to obtain a "declaratory judgment that she is a citizen of the United States and entitled to all of the rights and privileges of citizenship." The opinion in part recites:

> "On her birth in New York the plaintiff became a citizen of the United States. Civil Rights Act of April 9, 1866, 14 Stat. at L. 27, chap. 31, 8 U. S. C. A. sec. 42, 14th Amend., sec. 1; *United States v. Wong Kim Ark,* 169 U. S. 649, 42 L. ed. 890."

The Circuit Court in *Perkins v. Elg,* 69 App. D. C. 175, 99 F. (2d) 408, and this Court in *Perkins v. Elg, supra,* determined that a declaratory judgment action to determine citizenship was proper. Miss Elg, however, obtained certiorari from the dismissal of the proceedings against the Secretary of State. This Court said:

> "The court below, properly recognizing the existence of an actual controversy with the defendants *(Aetna L. Ins. Co. v. Haworth,* 300 U. S. 227, 81 L. ed 617, declared Miss Elg 'to be a natural born citizen of the United States' and we think that the decree should include the Secretary of State as well as the other defendants. The decree in that sense would in no way interfere with the exercise of the Secretary's discretion with respect to the issue of a passport but would simply preclude the denial of a passport on the sole ground

that Miss Elg had lost her American citizenship." (*Perkins v. Elg*, 307 U. S. 349, 350.)

In *Heikkila v. Barber*, April 1, 1953, Vol. 73, No. 11, Supreme Court Reporter, p. 603, this Court determined:

> "Heikkila suggests that *Perkins v. Elg, 1939*, 307 U. S. 325, 59 S. Ct. 884, 83 L. Ed. 1320 (declaratory and injunctive relief), and *McGrath v. Kristensen*, 1950, 340 U. S. 162, 71 S. Ct. 224, 95 L. Ed. 173 (declaratory relief), were deviations from this rule. But neither of these cases involved an outstanding deportation order. Both Elg and Kristensen litigated erroneous determinations of their status, in one case citizenship, in the other eligibility for citizenship. Elg's right to a judicial hearing on her claim of citizenship had been recognized as early as 1922 in *Ng Fung Ho v. White*, 259 U. S. 276, 42 S. Ct. 492, 66 L. Ed. 938. And Kristensen's ineligibility for naturalization was set up in contesting the Attorney General's refusal to suspend deportation proceedings under the special provisions of sec. 19 (c) of the 1917 Immigration Act, as amended, 8 U. S. C. A. sec. 155 (c). Heikkila's status as an alien is not disputed and the relief he wants is against an outstanding deportation order. He has not brought himself within *Elg* or *Kristensen*."

THE RESTRAINT IMPOSED UPON PETITIONER'S LIBERTY BY THE IMMIGRATION SERVICE ENTITLES HIM TO A DETERMINATION OF THE ISSUE OF CITIZENSHIP THROUGH HABEAS CORPUS PROCEEDINGS.

In deportation proceedings, where a bonafide claim of citizenship is presented, such person need not be in actual physical custody behind bars to test the legality of the restraint by habeas corpus.

We propound the query: Is appellant deprived of liberty? The government answers by saying that his detention and restraint is only in a "technical" sense. Further, it is suggested that he is an alien; being an alien, he is free to depart from the United States to any country of his choice. If he seeks to remain during his administrative processes, he is subject to any parole restriction imposed by the executive. He is required to report at such times as the Government suggests; he must report for deportation; he is subject without his will to psychiatric and physical examinations; he must make a complete disclosure of his whereabouts, associations and business activities. If obedience is not accepted, the penalty is imprisonment, or fine, or both. Only the most naive believe that this is not deprivation of liberty.

Realistically this man is incarcerated by a combination of forces which keeps him as effectively chained to the dominate and proximate forces of the United States Immigration authority as if his movements were

limited within the confined areas of a prison. It overworks legal fiction to say that one is free in law when by the commonest of common sense he is bound by the chain of the restrictive thongs of the executive. The purported legal logic of the Government's argument on this point leads to an artificial and unreal conclusion. The guaranty of the fifth amendment that no person shall be deprived of life, liberty or property without due process of law, by one claiming citizenship is not afforded due process merely because the executive claims him to be an alien and orders him to be deported. Unless such person is afforded legal, judicial redress by a determination through judicial process of his claim of citizenship, then any person, even though he be a citizen, can be deported merely upon executive order.

We desire to reiterate to this Court that the label of the petition does not alter or abridge its substance. In effect, it is a plea to the judiciary for a determination of his citizenship. The right of a native born to his birth right—the right to live in freedom—is one of the most highly prized possessions of a free people.

This so-called executive imprisonment has been considered oppressive and lawless since John at Runnymede pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled, save by the judgment of his peers or by the law of the land. The Judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint.

Judicial determination of citizenship may be accomplished through many forms. In *Perkins vs. Elg,* through declaratory and injunctive relief; in *McGrath vs. Kristensen,* eligibility for citizenship was determined through declaratory relief, and through habeas corpus as exemplified in the leading case of *U. S. vs. Wong Kim Ark,* 169 U. S. 649.

In *Kessler vs. Strecker,* 307 U. S. 22, the Court made the following observation:

> "A district court cannot upon habeas corpus, proceed *de novo* for the function of investigation and finding has not been conferred upon it but upon the Secretary of Labor. Only in the event an alleged alien asserts his United States citizenship in the hearing before the Department, and supports his claim by substantial evidence, is he entitled to a trial *de novo* of that issue in the district court. *The status of the relator must be judicially determined because jurisdiction in the executive to order deportation exists only if the person arrested is an alien; and no statutory proceeding is provided in which he can raise the question whether the executive action is in excess of the jurisdiction conferred upon the Secretary.*"

See, also, *United States vs. Sing Tuck,* 194 U. S. 161; *United States vs. Tod,* 263 U. S. 149, and *Tod vs. Waldman,* 266 U. S. 113.

Wales v. Whitney, 114 U. S. 564, deals with the jurisdiction of the Court over the military and the right to habeas corpus in military processes. The Court suggested the following:

The Court commented:

"There is no very satisfactory definition to be found in the adjudged cases, of the character of the restraint or imprisonment suffered by a party applying for the writ of habeas corpus, which is necessary to sustain the writ. This can hardly be expected from the variety of restraints for which it is used to give relief. Confinement under civil and criminal process may be so relieved. Wives restrained by husbands, children withheld from the proper parent or guardian, persons held under arbitrary custody by private individuals, as in a mad-house, as well as those under military control, may all become proper subjects of relief by the writ of habeas corpus. Obviously, the extent and character of the restraint which justifies the writ must vary according to the nature of the control which is asserted over the party in whose behalf the writ is prayed."

THE PETITION AND ANSWER FRAMED THE ISSUES WHICH ENTITLED PETITIONER TO A JUDICIAL DETERMINATION BEFORE THE DISTRICT COURT UPON HIS CLAIM OF UNITED STATES CITIZENSHIP, AND IT WAS ERROR FOR THE COURT TO DISMISS THE PROCEEDINGS.

A claim of United States citizenship is protected by the Fifth Amendment of the Constitution of the United States in its guarantee of due process of law, and a *quasi* appellate review by a Court does not make them so. Where a person claims citizenship and makes a showing that his claim is not frivolous, *the jurisdiction of the Immigration Department may be tested in the Courts.*

The mere form of the proceedings to judicially determine citizenship, whether by habeas corpus, injunction, declaratory relief, or other process, is of no import. If a person arrested under processes of the executive in deportation proceedings, detained, paroled and restrained of his liberty under conditions as obtain in the instant matter, claims his citizenship, supports his claim by substantial proof (in this particular case, his birth and residence in the United States is without dispute and admitted in the answer) upon his application for a writ of haveas corpus, or by whatever nomenclature he may label his proceedings, he is entitled to a hearing before the Court and a judicial determination of his citizenship. This may be done at any stage

of the proceedings pending before the executive, as his claim of citizenship is a denial of the jurisdiction of the executive to proceed and a defense which is cognizable under and protected by the Fifth Amendment of the Constitution of the United States. See *Espino v. Wixon,* 136 Fed. (2d) 96.

It has been determined that in deportation proceedings, civil in their nature, habeas corpus is available even though a person is not restrained behind prison bars. It was held in *United States v. Curran,* 297 Fed. 946, at 949, 950:

> "The term 'imprisonment imports any restraint placed upon one contrary to his wishes and amounting to a physical detention of his person. It is not necessary that he should be restrained behind prison bars." (And cases cited.)

The contention here propounded is that the petitioner is being restrained of his liberty to free movement and action, in violation of the Constitution of the United States, for the reason that he is a constitutional citizen of the United States and any infringement or restraint of such liberty constitutes a violation of his inherent rights and privileges as a citizen of the United States. It is not necessary that he be confined in actual physical custody or confined behind bars of a prison or jail. His right of effective movement and freedom of action as limited by the provisions of the order of conditional parole and the applicable sections of 150.6 C. F. R. is to all intents and purposes

a deprivation of his rights as a citizen as though he were actually confined behind prison bars. A Court cannot deny a constitutional citizen of the United States the protection which he seeks from the Court from actions of the executive who denies him his privileges as such constitutional citizen and attempts to deport him from the United States. This is his inherent privilege and basic right as a citizen of the United States. It would tax one's credulity to believe that under our constitutional form of government an immigration official, believing one to be an alien of the United States, could cause his arrest and detention and direct his release on parole, and then suggest that he has no immediate remedy by a judicial determination of his claim of United States citizenship, but must suffer through the executive processes until a final determination and actual imprisonment before his right to a judicial determination of his claim of American citizenship could be determined.

The requirements of due process of law are not met where the Judge on habeas corpus hearing examines the petition and the answer, and thereupon determines that the Court is without jurisdiction because the petitioner is not restrained of his liberty behind bars or in a prison. The petitioner is entitled to a full, fair and impartial trial *de novo* on the issue of citizenship in the District Court. He is entitled to a judicial determination of his claim of citizenship.

IS PETITIONER ENTITLED TO A DECLARATION THAT HE IS A UNITED STATES CITIZEN FOR THE REASON THAT SECTION 801(j), TITLE 8, U. S. C., IS UNCONSITUTIONAL?

This inquiry raises the question of the assumed constitutionality of section 801(j), Title 8, U. S. C., which reads as follows:

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> . . . . . .
>
> (j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States. As amended Jan. 20, 1944, c. 2, sec. 1, 58 Stat. 4; July 1, 1944, c. 368, sec. 1, 58 Stat. 677; Sept. 27, 1944, c. 418, sec. 1, 58 Stat. 746."

Be it remembered that the warrant in this case charges the petitioner with having entered the United States "on or about December 15, 1944." Section 801(j), under which these proceedings are being conducted and under which it is sought to deport petitioner from the United States, became effective September 29, 1944. In a matter of days from the effective date of the Act, petitioner returned to the United States. There is no claim or intimation that he ever acquired citizenship in any other country or expatri-

ated himself by some voluntary act on his part through proceedings of naturalization in a foreign country; yet, it was determined by the Immigration Service, and is now the existing order of that department, that he is an alien of the United States.

The point under discussion does not involve the unquestioned power of Congress to enact naturalization laws and to condition the retention of the status of citizenship so acquired. Over such matters Congress has plenary power under Art. 1, Section 8, Clause 4 of the Constitution:

> "The Congress shall have power . . .
> "To establish an uniform Rule of Naturalization . . ."

Too, it may be granted that a native citizen may lose that status by naturalization in a foreign country if the American national complies with the formalities with a specific, as distinguished from constructive, intention to cast off his United States citizenship.

Our concern is, rather, where in the Constitution is to be found any grant of power—specific or reasonably implied—by which Congress is authorized to divest an American born citizen of his citizenship and nationality?

The Primary Legal Test of American Citizenship

The primary legal test by which United States citizenship is determined is place of birth. The test is a Constitutional one:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside."
>
> Amendment XIV, Section 1.

While the Constitution gives the Congress plenary power over citizenship by *naturalization,* it leaves the Congress no power whatsoever to interfere with American citizenship by *birth.*

The leading case on this subject is *United States v. Wong Kim Ark,* 169 U. S. 649 (1898). While some of its teachings seem to have been occasionally forgotten or whittled down in recent years, it has never been overruled.

The question there presented by the record was whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, were subjects of the Emperor of China, but had a permanent domicile and residence in the United States and were there carrying on business, and were not employed in any diplomatic or other official capacity under the Emperor, became at the time of his birth a citizen of the United States.

After an exhaustive review of the authorities, in the United States and abroad, the Supreme Court said:

> "There is, therefore, little ground for the theory that, at the time of the adoption of the Fourteenth Amendment of the Constitution of the United States, there was any settled and definite

> rule of international law, generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion." (Page 667).

To put beyond further argument the lack of Congressional power to take away American citizenship acquired by birth, the Court continued:

> "The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate *naturalization,* has conferred no authority upon Congress to restrict the effect of *birth,* declared by the Constitution *to constitute a sufficient and complete right to citizenship."* (Emphasis supplied) (Page 703).

That principle has been followed to the present day. In *Morrison v. California,* 291 U. S. 82, 85 (1934), Mr. Justice Cardozo said, citing the *Wong Kim Ark* decision, *supra:*

> "A person of the Japanese race is a citizen of the United States if he was born within the United States."

And in *Dos Reis v. Nicolls,* 1 Cir., 161 F. 2d 860, 862 (1947), the Court said:

> "When Camara was born in Massachusetts in 1921, he then became an American citizen, not by gift of Congress, but by force of the Constitution of the United States (Fourteenth Amendment)," citing the *Wong Kim Ark* case, *supra.*

The "Right" of Expatriation is not to be Converted into a Liability by Congressional Fiat.

Section 800 of Title 8, United States Code, deals eloquently with the "right" of expatriation, yet Section 801, applicable alike to native and naturalized citizens, attempts to spell out some ways in which that "right" may become a liability.

The only means of divesting one's self of United States citizenship is by voluntarily undergoing in a foreign state a process comparable to our own naturalization procedure.

Congress may not thus declare that by performing such and such an act, in or out of the United States, a citizen will become expatriated. Congress has been given control over only one means of *creating* United States citizenship, namely by naturalization. It has the power to create and to condition that grant of citizenship; but it is wholly devoid of any power to destroy citizenship by *birth*.

The contention that Congress may wipe out one's status as a United States citizen by declaring that the performance of such and such an act will result in expatriation can be reduced to an absurdity. Suppose, for example, that Congress instead of legislating as it has in Section 801 (c) and (e), had simply declared that owning a gun, or voting in a school or bond election in a foreign state was sufficient to effect a forfeiture of United States citizenship. Or, going a step further, suppose Congress were to say that attending

a military parade, or a political rally in a foreign country would do the trick. Can United States citizenship be frittered away so easily?

And there is also another side to be considered. May the duties and responsibilities of United States citizenship be avoided by convenient expatriation under Section 801? And other recent treason cases where loss of citizenship was asseted as a defense.*

United States citizenship may more easily be acquired than lost. (See *Kawakita v. United States, supra.*)

Stricter enforcement of the law of treason may well be the solution to the problem of dual citizens such as this, who selfishly play one country against the other.

WHEREFORE, petitioner prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit.

Respectfully submitted,

DOLLY LEE BUTLER and
DAVID C. MARCUS,
Attorneys for Petitioner.

---

*There have been authoritative intimations to the contrary. See *Mackenzie v. Hare*, 239 U. S. 299, 311-312; *Perkins v. Elg*, 307 U. S. 325, 329; and *Kawakita v. United States*, 9 Cir., decided June 22, 1951 and this court opinion in *U. S. v. Kawakita*. But only in the *Mackenzie* case was the precise Constitutional question here involved squarely presented, and there under vastly different facts.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 517

HARRY EDWARD FLORENTINE, PETITIONER

v.

H. R. LANDON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, LOS ANGELES, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Appeals (R. 28-32) are reported at 206 F. 2d 870.

JURISDICTION

The judgment of the Court of Appeals was entered on August 27, 1953 (R. 33). In the last of three orders extending time, an order of December 30, 1953, by Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including January 4, 1954, and the petition was filed on December 31, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an application for a writ of habeas corpus seeking to establish petitioner's alleged United States citizenship for the purpose of avoiding deportation, brought after administrative hearings had been reopened at petitioner's request and when he was not in custody, was properly dismissed as premature.

STATEMENT

From the application for a writ of habeas corpus, filed by petitioner in the United States District Court for the Southern District of California, and the return thereto filed by respondent as the District Director of Immigration and Naturalization at Los Angeles, the following facts emerge:

Petitioner was born in the United States on March 18, 1911, at Los Angeles, California (R. 3, 14). Respondent alleges that petitioner lost his United States citizenship, and became an alien by expatriating himself under Section 401(j) of the Nationality Act of 1940 as amended (58 Stat. 476) by reason of departing from and remaining outside the United States during time of war, from September 1942 to December 1944, after having received his order for induction into the armed forces of the United States (R. 14).

On December 15, 1944, when petitioner attempted to enter the United States at El Paso, Texas, he was excluded from permanent admission, as an alien without a valid immigration visa, but was paroled to answer a criminal charge for failure to report for induction under 50 U.S.C. 311 (R. 15, 5).

On March 27, 1951, petitioner was taken into custody by the Immigration and Naturalization Service under a warrant of arrest for deportation and released upon conditional parole the same day, being required to report to the parole officer on the 26th day of each month by mail or in person (R. 6, 15-16). On June 3, 1951, the hearing officer decided that although petitioner was a native born citizen, he had remained out of the United States to evade military service, so that at the time of his last purported entry on December 15, 1944, he was an alien not in possession of a valid immigration visa and was therefore deportable (R. 8-9). On June 14, 1951, a new order of conditional parole was issued requiring petitioner to (1) produce himself to answer charges against him; (2) to appear for deportation, if an order of deportation were made; (3) to furnish upon request additional, necessary information about his case; (4) to notify the Service of any change of address or employment; (5) to report in writing to the Service on the 26th day of each month (R. 6, 10-12, 16).

On June 26, 1951, the Service reopened the deportation proceedings at petitioner's request to permit him to apply for the discretionary relief of suspension of deportation, and a further hearing was set for October 30, 1952 (R. 9, 17). On October 28, however, the habeas corpus petition was filed, and the District Court on October 29 issued a temporary restraining order against further action by respondent in the deportation proceedings (R. 10, 13, 17). Respondent alleges that petitioner has

never withdrawn his request for reopening of the deportation proceedings, but by the petition for habeas corpus has prevented the completion of administrative action in the deportation proceedings (R. 17).

After examination of the pleadings and consideration of written and oral argument, the District Court decided that such restraint as might exist against petitioner under the order of conditional parole of June 14, 1951, was insufficient to warrant habeas corpus, and ordered discharged the writ of habeas corpus previously issued (R. 19-22). On appeal, this judgment was unanimously affirmed (R. 22, 33). The court below decided that the petition for habeas corpus was premature, since petitioner had failed to exhaust his administrative remedies in the deportation proceedings before asserting his claim of citizenship in the habeas corpus proceedings (R. 28-31). In his concurring opinion Judge Orr stated he would also affirm on the ground assigned by the trial court, *viz.*, that the "restraint upon the person of the petitioner by virtue of the order of conditional parole was not sufficient to invoke the jurisdiction of the court on a writ of habeas corpus" (R. 31-32).

ARGUMENT

1. It was by virtue of petitioner's affirmative action in requesting reopening of the deportation proceedings that the administrative process, which had already been instituted, was interrupted before a final decision as to deportation could be made. Under these circumstances, we submit that the

court below was clearly correct in holding that orderly procedure requires that the administrative process, once begun, should be allowed to run to completion before an action for judicial review in any form can be instituted.

The thrust of the petitioner's argument is that the Constitution forbids the Immigration and Naturalization Service from conducting an administrative proceeding to determine whether he is an alien subject to deportation. This contention finds no support in the decisions of this Court. Of course, under *Ng Fung Ho* v. *White,* 259 U.S. 276, petitioner is entitled to a judicial determination of a substantial claim of citizenship which he raises to avert deportation. Indeed, in Section 503 of the Nationality Act of 1940 (8 U.S.C. 903), since superseded by Section 360 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 273, Congress provided a special declaratory judgment procedure for the judicial determination of claims of American nationality in cases where "a right or privilege as a national of the United States is denied * * * by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States." However, neither Congress nor this Court has ever suggested that the Attorney General, acting through the Immigration and Naturalization Service, is precluded from determining a claim of citizenship asserted in a deportation proceeding, subject, of course, to a later independent judicial determination of that claim at the behest of the person involved.

On the contrary, as the court below held, the situation here presented is governed by *United States* v. *Sing Tuck,* 194 U.S. 161, where a group of Chinese, held by immigration authorities when they attempted to enter the country, attempted to have their claim of citizenship decided by a court in habeas corpus proceedings before exercising their right of appeal to the Secretary of Commerce and Labor. In overruling their right to test the issue at such time, this Court, through Justice Holmes said, at p. 168:

> We perfectly appreciate, while we neither countenance nor discountenance, the argument drawn from the alleged want of jurisdiction. But while the consequence of that argument if sound is that both executive officers and Secretary of Commerce and Labor are acting without authority, it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way. If the allegations of a petition for *habeas corpus* setting up want of jurisdiction, whether of an executive officer or of an ordinary court, are true, the petitioner theoretically is entitled to his liberty at once. Yet a summary interruption of the regular order of proceedings, by means of the writ, is not always a matter of right. A familiar illustration is that of a person imprisoned upon criminal process by a state court under a state law alleged to be unconstitutional. If the law is unconstitutional the prisoner is wrongfully held. Yet except under exceptional circumstances

> the courts of the United States do not interfere by *habeas corpus*. The prisoner must in the first place take his case to the highest court of the State to which he can go, and after that he generally is left to the remedy by writ of error if he wishes to bring the case here. * * *

In the instant case, the proceeding before the administrative hearing officer was reopened at the request of petitioner to permit him to apply for suspension of deportation under 8 U.S.C. 155(c). Clearly, petitioner is not entitled to invoke judicial intervention at a time when the administrative hearing before the hearing officer has not yet been completed. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375. Moreover, even if the proceeding is again closed with a determination by the hearing officer that petitioner should be deported, petitioner has a right to appeal to the Board of Immigration Appeals to which he may address briefs and oral argument. 8 C.F.R. Part 90; the regulations governing such appeals under the 1952 Act are in 8 C.F.R. (rev. 1952) Part 6. We submit that this right to appeal to the Board is an administrative remedy which petitioner must exhaust before he challenges the administrative proceedings in the courts. *United States* v. *Sing Tuck, supra;* Davis, *Administrative Law* (1951), pp. 639-640. Petitioner's claim that the Service is without jurisdiction to deport him because he is a citizen (Pet. 48-50) does not relieve him from the exhaustion requirement, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, nor does his contention that

Section 401 (j) of the Nationality Act of 1940, as amended (now Section 349(a) (10) of the Immigration and Nationality Act of 1952) is unconstitutional. *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U.S. 752.

If the petitioner is required to exhaust his administrative remedies, it may be that the final administrative action will not be an order for his deportation. If, as a result, he is not detained for deportation, there will be no basis for habeas corpus proceedings, and if he is not otherwise threatened with deportation, the Attorney General will not be in the position of denying him any right or privilege of a national of the United States for the purpose of any other kind of legal proceeding, such as under Section 360(a) of the Immigration and Nationality Act of 1952 (the successor to Section 503 of the Immigration and Nationality Act). Indeed, at that point, there would be no case or controversy between petitioner and the Attorney General.

The prematurity of this habeas corpus proceeding is emphasized by the fact that petitioner at this time probably could not bring an action under Section 360(a) of the 1952 Act. Section 360(a), somewhat like the predecessor Section 503 of the Nationality Act of 1940, authorizes a judicial determination of a claim of American nationality made by a person within the United States who "claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the

United States." Such a judicial determination is to be made in an action under the Declaratory Judgment Act "against the head of such department or independent agency", and "may be instituted only within five years after *the final administrative denial* of such right or privilege." We believe that the quoted portions of Section 360(a) make clear that this judicial remedy is available only upon the denial of a right or privilege as a national of the United States by the head of a governmental agency or some other officer who is empowered to make a final and authoritative decision on the matter in issue. It cannot have been intended to subject the heads of agencies to suits merely upon the preliminary or proposed denial of such rights or privileges by subordinate officers or, as here, during the course of administrative proceedings to determine whether such a right should be granted or denied.

The course of action which petitioner seeks to follow will result in piecemeal challenge of deportation proceedings in the courts. It would mean that any alien who puts forward a claim of citizenship at any stage in a deportation proceeding could immediately obtain a judicial determination of that claim alone; if he loses and the deportation proceeding is completed and results in an order for his deportation, he can then raise in habeas corpus any other objections which he may have to the deportation proceedings. The efficient conduct of administrative hearings and the orderly judicial review of administrative action equally preclude such inter-

ruption of the administrative process and such repetitive resort to the courts.

2. It is clear that there is not in this case the requisite custody which will support a habeas corpus proceeding. Petitioner's conditional parole is analogous to the situation where a prisoner is free on bail, under which circumstance there is not the requisite custody to warrant habeas corpus. Cf. *Stallings* v. *Splain,* 253 U.S. 339, 343; *Johnson* v. *Hoy,* 227 U.S. 245, 247-248; *In re Rowland,* 85 F. Supp. 550, 554 (W.D. Ark.), affirmed, 179 F. 2d 709 (C.A. 8), certiorari denied, 339 U.S. 952; *United States ex rel. Walmer* v. *Tittemore,* 61 F. 2d 909 (C.A. 7); *Unverzagt* v. *United States,* 5 F. 2d 494 (C.A. 9), certiorari denied, 269 U.S. 566.[1]

After the administrative process is complete petitioner may, if he is in custody, renew his habeas corpus application or he may, if appropriate to the issues he wishes to raise, institute another form of action by pleadings applicable to that form of action. The issues can then be formulated and litigated in proper form and determined in the first instance by the lower courts. At this time there is before this Court no issue which would warrant the grant of certiorari.

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[1] See also *Weber* v. *Squier,* 315 U.S. 810; *Siercovich* v. *McDonald,* 193 F. 2d 188 (C.A. 5); *Van Meter* v. *Sanford,* 99 F. 2d 511 (C.A. 5), to the effect that after a prisoner is released on parole, he is no longer in custody of the warden to enable him to bring habeas corpus.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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